IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN SHEEHAN	:	CIVIL ACTION
v.	:	
THOMAS ANDERSON, et al.	:	NO. 98-5516

MEMORANDUM AND ORDER

BECHTLE, J. MARCH , 2000

Presently before the court is defendants the Federal Reserve Bank of Philadelphia's, Thomas Anderson's, Alan Kiel's, John Deibel's, John Mendell's and Michael Collins' (collectively "Defendants") motion for summary judgment and plaintiff John Sheehan's response thereto. For the reasons set forth below, the motion will be granted.

I. BACKGROUND

Plaintiff John Sheehan ("Sheehan") and Defendants Michael Collins ("Collins"), John Deibel ("Deibel") and John Mendell ("Mendell") all work in the Supervision Regulation & Credit Department (the "SRC Department") of the Federal Reserve Bank of Philadelphia ("Reserve Bank"). (Defs.' Mot. for Summ. J. at 5-6.) Sheehan began his employment at the Reserve Bank in 1987. (Sheehan Dep. at 231.) He is currently a Supervising Examiner in the SRC Department. Defendant Thomas Anderson ("Anderson") worked in the SRC Department from April 1997 through October 1999. (Defs.' Mot. for Summ. J. at 6.) Defendant Alan Kiel ("Kiel") works in the Human Resources Department of the Reserve

Bank. (Defs.' Mot. for Summ. J. at 6.)[1]

Sheehan alleges that in August 1997, he and Anderson conducted an examination of an American bank's operations in Germany. (Second Am. Compl. ¶ 7.) Sheehan supervised Anderson and two other examiners on that project. (Second Am. Compl. ¶ 8; Defs.' Br. in Support of Mot. for Summ. J. at 9.) During the examination, Anderson "uttered . . . slander against plaintiff, to Ian Harvey, a co-employee [and] defendant[s] [John] Deibel and [John] Mendell."[2] (Second Am. Compl. ¶ 9.) According to the Second Amended Complaint, Anderson stated that: (1) Sheehan "stated negative remarks against Reserve Bank of Philadelphia management in the presence of CitiBank management while on site in Germany"; (2) Sheehan "verbalized a negative remark against a Chase Bank female officer"; (3) Sheehan "fostered an antagonistic work environment" and (4) Sheehan "sat around the work place every morning for approximately one to one and a half hours talking and drinking coffee." (Second Am. Compl. ¶ 10.) Based on Anderson's statements, Deibel reprimanded Sheehan. (Second Am. Compl. ¶ 11.) Sheehan alleges that Anderson's statements damaged his professional reputation. (Second Am. Compl. ¶ 13.) Defendants filed the instant motion for summary judgment on all

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[1] The court has jurisdiction pursuant to 28 U.S.C. § 1331 and the Federal Reserve Act, 12 U.S.C. § 632.

[2] Deibel and Mendell are "superior officers" employed by the Reserve Bank. (Second Am. Compl. ¶ 9.) Ian Harvey, a Supervising Examiner in the International Safety and Soundness Unit, was the Examiner in Charge of the examination. (Sheehan Dep. at 7.)

claims against them.

II. LEGAL STANDARD

Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A factual dispute is material only if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Whether a genuine issue of material fact is presented will be determined by asking if "a reasonable jury could return a verdict for the non-moving party." Id. In considering a motion for summary judgment, "[i]nferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (citation omitted).

III. DISCUSSION

In his Second Amended Complaint, Sheehan alleges that Anderson slandered him, that the Reserve Bank engaged in "bad faith" and that Defendants engaged in a conspiracy to harass, injure and create a hostile work environment. (Pl.'s Mem. in

Opp'n to Summ. J. at 1.) Defendants seek summary judgment on all counts of Sheehan's Complaint. The Court will address each count separately.

A. Defamation

Count II of Sheehan's Second Amended Complaint is labeled "Libel and Slander."[3] Defendants argue that Sheehan's defamation claim fails as a matter of law because the alleged statements were privileged and because Sheehan cannot establish that the statements are capable of defamatory meaning.

During the first week of the bank examination in Germany, Anderson told Harvey, the examiner in charge of the examination, that he had witnessed Sheehan making negative comments about the Federal Reserve Bank of Philadelphia's management. (Anderson Dep. at 70-73.) During the last week of the examination, Anderson told Deibel, who was an assistant vice president at the Reserve Bank, that:

> a. Plaintiff made negative remarks against Federal Reserve Bank of Philadelphia management in the presence of CitiBank management while on site in Germany;
>
> b. Plaintiff verbalized a negative remark against a Chase Bank female officer;
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> c. Plaintiff fostered an antagonistic work environment whereby co-workers could not be open in his presence, afraid to talk openly and express their opinions and examiner work comments [and]

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[3] In its Order dated July 30, 1999, the court dismissed this count to the extent that it sought recovery based on a libel theory of defamation, because Sheehan did not allege that any defamatory statements were published in written or printed form by Defendants.

d. Plaintiff sat around the work place every morning for approximately one to one and a half hours talking and drinking coffee.

(Second Am. Compl. ¶ 10; Anderson Dep. at 78-79, Deibel Dep. at 5-6 & 26.)[4] Anderson also told Mendell that Sheehan was sitting around drinking coffee, talking and not working. (Anderson Dep. at 92-93.)[5]

Defendants assert that Sheehan cannot establish that the statements are capable of defamatory meaning. "[I]t is the court's duty to determine if the publication is capable of the defamatory meaning ascribed to it by the party bringing suit." Beverly Enterprises, Inc. v. Trump, 182 F.3d 183, 187 (3d Cir. 1999) (quotations omitted). "A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him." Id. (quotations omitted). To be defamatory, the statement must concern the plaintiff's abilities to "perform [his] job" and "harm [his] trade or ability to become employed elsewhere." Maier v. Maretti, 671 A.2d 701, 705-06 (Pa. Super. Ct. 1995). A communication is defamatory "if it ascribes to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his

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[4] Deibel is currently a Vice President at the Reserve Bank. (Deibel Dep. at 6-7.)

[5] Mendell is the Team Manager for Specialty Examinations, is responsible for scheduling and staffing examinations and prepares performance appraisals for team members. (Mendell Dep. at 9 & 13-14.)

proper business, trade or profession." Id. at 704.

Defendants argue that Anderson's statements are not defamatory because they criticized Sheehan's actual job performance rather than Sheehan's fitness or ability to do his job. Courts have distinguished statements about a person's actual job performance from statements about a person's fitness to perform his job. See Maier, 671 A.2d at 704-06 (stating that allegations that employee was "crude, vulgar and insubordinate" were not capable of defamatory meaning); Gordon v. Lancaster Osteopathic Hosp. Assoc., Inc., 489 A.2d 1364, 1368-69 (Pa. Super. Ct. 1985) (holding that letters written by hospital staff where plaintiff was doctor, which stated that staff (1) was unhappy with plaintiff, (2) was presenting vote of no confidence in plaintiff, (3) lacked trust in reporting of plaintiff, (4) wanted Pathology Department to become stronger, and (5) had difficulty communicating with plaintiff, did "not impute a charge of incompetency or unfitness" and were not capable of defamatory meaning); Wendler v. DePaul, 499 A.2d 1101, 1103 (Pa. Super. Ct. 1985) (holding that statements criticizing employee's job performance were not capable of defamatory meaning). The court finds that Anderson's statements, which concern Sheehan's job performance rather than his fitness or ability to perform his job, are not capable of defamatory meaning. This finding is supported by the factual context within which the words were spoken and the nature of the intended audience. See id. (finding that statements made in context of employment related report to

manager were not capable of defamatory meaning). Anderson asserts that his statements were made because he felt they were damaging to the credibility of the Reserve Bank and needed to be stopped. (Anderson Dep. at 70-71.) Anderson's statements were directed to his and Sheehan's superiors. (Second Am. Compl. ¶ 9; Sheehan Dep. at 7.)

Defendants also argue, and the court agrees, that Anderson's statements to his supervisors were privileged. "Communications made on a proper occasion, from a proper motive, in a proper manner, and based upon reasonable cause are privileged." Elia v. Erie Ins. Exchange, 634 A.2d 657, 660 (Pa. Super. Ct. 1993) (citations omitted). Under Pennsylvania law, a communication is conditionally privileged when "(1) some interest of the person who publishes defamatory matter is involved; (2) some interest of the person to whom the matter is published or some other third person is involved; or (3) a recognized interest of the public is involved." Burns v. Supermarkets Gen'l Corp., 615 F. Supp. 154, 158 (E.D. Pa. 1985) (citations omitted). The communications at issue in this case satisfy both the first and second prongs of this test. Anderson had an interest in apprising his managers of what he perceived to be behavior that was detrimental to the Reserve Bank, and his supervisors had an interest in receiving this information. See Giusto v. Ashland Chem. Co., 994 F. Supp. 587, 593 (E.D. Pa. 1998) (concluding that co-worker's communications to employer "were conditionally privileged because they involved workplace communications regarding a subject matter

of common interest").

"Once a matter is deemed conditionally privileged, the plaintiff must establish that the defendant abused the conditional privilege." Elia, 634 A.2d at 661.[6] Sheehan contends that Anderson abused the privilege because his comments were made with malice. (Pl.'s Mem. in Opp'n to Summ. J. at 33.) He asserts that:

> (1) Anderson, acting at his managers' direction that he provide them with dirt on Sheehan, knowingly spoke falsely about Sheehan; and (2) Anderson made his statements for the improper purpose of aiding Bank management's ongoing malicious personal campaign to smear, harass, and stifle the career of Sheehan.

Id.

"Malice consists of a wrongful act, done intentionally without just cause or excuse." Elia, 634 A.2d at 661 n.2 (citations omitted.) Malice means that the defendant made the alleged statement "with knowledge that the statement was false or with reckless disregard of whether or not it was true." DiSalle v. P.G. Pub. Co., 544 A.2d 1345, 1349 (Pa. Super. Ct. 1988). To

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[6] A conditional privilege may be abused when the publication:

1) is actuated by malice or negligence;
2) is made for a purpose other than that for which the privilege is given;
3) is made to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege; or
4) includes defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose.

Elia, 634 A.2d at 661.

find recklessness, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

Although Sheehan asserts that Anderson's statements were made with malice, Sheehan offers no factual evidence of Anderson's state of mind at the time of publication.[7] Simply asserting that publication is made with malice is not sufficient. Elia, 634 A.2d at 661; Miketic v. Baron, 675 A.2d 324, 330-31 (Pa. Super. Ct. 1996) (dismissing complaint for failure to "demonstrate facts which would support a finding that the publication was a result of malice or improper purpose" and requiring factual basis for state of mind ascribed to defendants). In this case, without evidentiary support, Sheehan alleges that the bank management sent Anderson on a "mission to dig up dirt on Sheehan," that it was "strange" that Anderson reported Sheehan's actions to supervisors, that other employees were asked to lower evaluations of Sheehan's work, that Anderson received an "atypical" raise four months after the examination and that the bank failed to conduct a "good faith" examination into the truth of Anderson's statements. (Pl.'s Mem. in Opp'n to

[7] Sheehan alleges only that Anderson acted "maliciously." (Second Am. Compl. ¶ 14.) For example, Sheehan asserts that Deibel acted "for reasons which are unknown to plaintiff." Id. ¶ 15.

Summ. J. at 35.)[8] Such conclusory allegations are insufficient to rise to the factual basis malice requires.[9] Based on the record, the court finds that there is not sufficient evidence for a reasonable jury to conclude that Anderson acted with malice.[10] Sheehan has failed to produce "sufficient evidence to permit the conclusion that the defendant in fact had serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968); see also Miketic, 675 A.2d at 330-31 (dismissing complaint for failure to demonstrate facts which would support finding of malice). Accordingly, the court will grant summary judgment in favor of Defendants on Count II of Sheehan's Second Amended Complaint.

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[8] As to Sheehan's contention that bank management asked other employees to "lower evaluations of [Sheehan's] work," the record reveals only that Robert Balke, a supervising examiner at the Federal Reserve Bank, was called to Mendell's office and "was told to give an honest report" regarding the quality of Sheehan's work. (Balke Dep. at 86 & 126-27.)

[9] Additionally, although it is apparent that Anderson and Sheehan did not get along, ill will alone is not "malice" in a defamation context. See Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 666 (1989) (stating "the actual malice standard is not satisfied merely through a showing of ill will").

[10] To the contrary, the evidence tends to support Defendants' contention that Anderson did not entertain serious doubts as to the truth of his publication. For example, the record shows that another examiner in Germany heard Sheehan making negative comments about the Federal Reserve Bank. (McWhite Dep. at 113-21.) Sheehan admits that he drank coffee throughout the day and talked with others on topics ranging from "the exam, to sports, to what did you do Sunday night . . . . I'd say everything." (Sheehan Dep. at 100-01.) Yet another examiner stated that he and the other staff, including Sheehan, sat around and drank coffee during the course of the exam. (Pomposello Dep. at 20-21.)

B. Bad Faith

Count III of Sheehan's Second Amended Complaint is labeled "Bad Faith Dealing and Harassment." In this vein, Sheehan asserts that Defendants: (1) breached their duty of good faith dealing, (2) violated the Administrative Procedures Act, (3) violated due process, and (4) violated the Federal Reserve Act of 1913. (Pl.'s Mem. in Opp'n to Summ. J. at 42.)

Defendants first point out that there is no common law remedy in Pennsylvania for bad faith conduct. The court agrees. See Poliselli v. Nationwide Mut. Fire Ins. Co., 126 F.3d 524, 530 (3d Cir. 1997); Bagden v. Equitable Life Assurance Soc'y, No. 99-CV-66, 1999 U.S. Dist. LEXIS 1141, at *2 (E.D. Pa. Feb. 5, 1999) (dismissing "bad faith" claim under Rule 12(b)(6)).

Nonetheless, Sheehan contends that Defendant's actions violate the Federal Reserve Act of 1913, an employment contract, the Administrative Procedures Act and due process. (Pl.'s Mem. in Opp'n to Summ. J. at 1.)

Under the Federal Reserve Act, the Reserve Bank has the power "to dismiss at pleasure" its officers and employees. Magel v. Federal Reserve Bank of Philadelphia, 776 F. Supp. 200, 205 (E.D. Pa. 1991). Sheehan asserts, however, that because he is an "examiner" he is not an "employee" and that therefore he is entitled to heightened protection. Sheehan provides no support for his construction of the statute. The court finds that the Federal Reserve Act does not support Sheehan's assertion. Rather, the legislative history supports the view that the "at

pleasure" language should apply to all employees. See Obradovich v. Federal Reserve Bank of New York, 569 F. Supp. 785, 790 n.17 (S.D.N.Y. 1983)(discussing how Congress "deliberately chose to use the broad term 'employees' in the dismiss at pleasure provision").

Under Sheehan's contract theory, he argues that Defendants breached their duty of good faith and fair dealing. (Pl.'s Mem. in Opp'n to Summ. J. at 42.) Sheehan points to his employment manual to support his assertion that the Reserve Bank breached its contract to deal with him in good faith. Id. at 42-43. Defendants argue, and the court agrees, that Sheehan's position is without merit. See Inglis v. Feinerman, 701 F.2d 97, 99 (9th Cir. 1983) (ruling that employment manual based on "good faith" could not create employment rights); Armano v. Federal Reserve Bank of Boston, 468 F. Supp. 674, 675-76 (D. Mass. 1979) (ruling that employment contract restricting Reserve Bank's statutory right to terminate at will is unenforceable); Kispert v. Federal Home Loan Bank of Cincinatti, 778 F. Supp. 950, 952 (S.D. Ohio 1991) (stating that implied contract claim was precluded by federal law).

Sheehan next asserts that he is afforded protection under the Administrative Procedures Act ("APA"), 5 U.S.C. § 555(e). However, Sheehan provides no legal support for this position. To the contrary, the Ninth Circuit has stated that the APA did not apply to a Federal Reserve Bank employee discharged from his job because Federal Reserve Banks have "unfettered" discretion in the

decision of whether to terminate an officer or employee. Bollow v. Federal Reserve Bank of San Francisco, 650 F.2d 1093, 1101-02 (9th Cir. 1981); see also Little v. Federal Reserve Bank of Cleveland, 601 F. Supp. 1372, 1374-75 (N.D. Ohio 1985) (dismissing claim brought by discharged employee who claimed that he was entitled to job protection under 5 U.S.C. § 7511 et seq. because plaintiff's employment relationship was governed by § 341, Fifth).[11] Sheehan's claim also fails because there can be no "arbitrary and capricious" review under the APA independent of another statute. Oregon Natural Resources Council v. Thomas, 92 F.3d 792, 797-98 n.10, n.11 (9th Cir. 1996) (discussing problem with "free-standing APA 'arbitrary and capricious' claims").

As to Sheehan's due process claim, defendants point out that an essential element of a due process claim is government action. For purposes of employment issues, the Reserve Bank is a private employer and cannot take government action. See Katsiavelos v. Federal Reserve Bank of Chicago, No. 93-C-7724, 1994 U.S. Dist. LEXIS 18501, at *10-11 (E.D. Ill. Dec. 27, 1994) (adopting EEOC decision that Federal Reserve Banks are private employers and not federal instrumentalities for purposes of the anti-discrimination laws). Thus, the court finds that Sheehan's due process claim must fail.

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[11] Similarly, because of the "at pleasure" language of the banking statutes, courts have held that Reserve banks are not bound by their internal policies. Obradovich, 569 F. Supp. at 790 (stating "[a]ny implied contract based upon the Federal Reserve's personnel rules would exceed the Federal Reserve's authority and be unenforceable").

Additionally, Defendants contend that Sheehan's state law employment claims (bad faith, breach of contract, breach of duty of good faith and fair dealing and tortious interference with contract) are preempted by the Federal Reserve Act. (Defs.' Reply Br. to Pl.'s Mem. in Opp'n to Summ. J. at 2.) The court agrees. The Federal Reserve Act "specifically provides that employees of the Federal Reserve Banks may be dismissed at pleasure." Ana Leon T. v. Federal Reserve Bank of Chicago, 823 F.2d 928, 931 (6th Cir. 1987) (citing 12 U.S.C. § 341, Fifth). This provision preempts any state created employment right. See id.; Inglis, 701 F.2d at 99 (affirming grant of summary judgment in favor of employer where employee alleged bank did not follow personnel manual); Katsiavelos v. Federal Reserve Bank of Chicago, No. 93-C-7724, 1995 U.S. Dist. LEXIS 2603, at *12 (N.D. Ill. Mar. 3, 1995) (holding that at pleasure language of Federal Reserve Act preempts "state law created contractual employment rights"); Kispert, 778 F. Supp. at 953 (concluding state law claims were precluded by federal law).

Thus, the court will grant summary judgment in favor of Defendants on Count III of Sheehan's Second Amended Complaint.

C. Conspiracy

Count I of Sheehan's Second Amended Complaint is labeled "Action and Conspiracy to Harass, Injure and Create a Hostile Work Environment." Count IV is labeled "Conspiracy." In these Counts, Sheehan alleges that individual employees of the Reserve Bank conspired against him by engaging in harassing conduct and

slandering him. (Second Am. Compl. ¶ 108.) Defendants point out that without an underlying unlawful act, there can be no conspiracy. The court agrees. See Caplan v. Fellheimer Eichen Braverman & Kaskey, 884 F. Supp. 181, 184 (E.D. Pa. 1995) (stating that "[a] claim for civil conspiracy can proceed only when there is a cause of action for an underlying act.") In the absence of a valid underlying claim, Sheehan's conspiracy claim must fail.[12] Thus, the court will grant summary judgment in favor of Defendants on Counts I and IV of Sheehan's Second Amended Complaint.

IV. CONCLUSION

For the reasons set forth above, the court will grant Defendants' motion for summary judgment.

An appropriate Order follows.

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[12] Count I also alleges that individuals conspired to create a hostile work environment. Defendants argue that this claim must fail because Sheehan cannot produce facts that he exhausted administrative remedies before bringing a hostile work environment claim. A hostile environment claim in an employment context is governed by Title VII of the Civil Rights Act of 1964. Before bringing an action under Title VII under a hostile work environment theory, a plaintiff must exhaust available administrative procedures in a timely fashion. See Epps v. City of Pittsburgh, 33 F. Supp. 2d 409, 413 (W.D. Pa. 1998) (granting Rule 12(b)(6) motion on plaintiff's hostile work environment claim because plaintiff failed to file charge with administrative agency). Sheehan has produced no evidence that he participated in any administrative procedure. Accordingly, the court will grant Defendant's motion for summary judgment on Sheehan's hostile environment claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOHN SHEEHAN	:	CIVIL ACTION
	:	
v.	:	
	:	
THOMAS ANDERSON, et al.	:	NO. 98-5516

ORDER

AND NOW, TO WIT, this day of March, 2000, upon consideration of defendants the Federal Reserve Bank of Philadelphia's, Thomas Anderson's, Alan Kiel's, John Deibel's, John Mendell's and Michael Collins' motion for summary judgment and plaintiff John Sheehan's response thereto, IT IS ORDERED that said motion is GRANTED.[1] Judgment is entered in favor of the Federal Reserve Bank of Philadelphia, Thomas Anderson, Alan Kiel, John Deibel, John Mendell and Michael Collins and against plaintiff John Sheehan on all counts.

IT IS FURTHER ORDERED that the following motions are DENIED AS MOOT:

1. defendants the Federal Reserve Bank of Philadelphia's, Thomas Anderson's, Alan Kiel's, John Deibel's, John Mendell's and Michael Collins' motion to dismiss plaintiff's amended complaint;

2. defendants the Federal Reserve Bank of Philadelphia's, Thomas Anderson's, Alan Kiel's, John Deibel's, John Mendell's and Michael Collins' motion for reconsideration of the court's July

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[1] IT IS FURTHER ORDERED that defendants the Federal Reserve Bank of Philadelphia's, Thomas Anderson's, Alan Kiel's, John Deibel's, John Mendell's and Michael Collins' application for leave to file reply brief is GRANTED; defendants' reply and plaintiff John Sheehan's response are hereby incorporated into the motion for summary judgment and response thereto.

29, 1999 Order;

3. defendants the Federal Reserve Bank of Philadelphia's, Thomas Anderson's, Alan Kiel's, John Deibel's, John Mendell's and Michael Collins' motion to dismiss plaintiff's second amended complaint;

4. plaintiff John Sheehan's motion to compel discovery;

5. plaintiff John Sheehan's motion in limine or for discovery; and

6. plaintiff John Sheehan's motion to compel production of documents.

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LOUIS C. BECHTLE, J.